

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Case No. 1:10cr387
Cleveland, Ohio
Plaintiff, May 20, 2011

vs.

JAMES C. DIMORA and
MICHAEL D. GABOR,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE

MOTION HEARING

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1 P R O C E E D I N G S

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3 THE COURT: Please be seated.

4 We're here on Case Number 1:10CR387, United

15:05:43 5 States of America versus James Dimora and Michael Gabor, and
6 the third defendant in this case was not required to attend
7 because he has not sought a continuance.

8 This matter is to discuss the pending motions
9 for continuance of the trial.

15:06:06 10 Counsel, if you would please identify yourself
11 for the record and indicate who you represent and indicate
12 if you have either government representatives or client
13 present, and we will begin with the government's counsel.

14 MS. BACON: Thank you. Assistant United
15:06:19 15 States Attorney Antoinette Bacon on behalf of the United
16 States. With me are my cocounsel, Ann Rowland and Nancy
17 Kelley, also on behalf United States. And the government's
18 representatives are Special Agent Mike Massie of the FBI and
19 Special Agent Kelly Fatula of the IRS.

15:06:35 20 THE COURT: Thank you. Next, counsel for Mr.
21 Dimora?

22 MS. WHITAKER: Good afternoon, Your Honor.
23 Andrea Whitaker and Bill Whitaker for Mr. Dimora, and Mr.
24 Dimora is present.

15:06:47 25 THE COURT: Thank you. Finally.

1 MR. CHRISTMAN: Thank you, Your Honor. Leif
2 Christman and Dave Oakley on behalf of Michael Gabor.
3 Michael Gabor is present.

4 THE COURT: Thank you. All right. We had
15:06:58 5 some limited argument on the motions for a continuance which
6 have been briefed, and there are a couple of areas of
7 clarification that the court would like before the court
8 makes a final decision on the final disposition of this
9 matter.

15:07:15 10 There's been mention regarding the number of
11 wiretaps involved in this case, and I would like a review of
12 the number of wiretaps with the discussion of the number of
13 pertinent wiretaps and the number of wiretaps involved or
14 required because of the filing of the superseding
15:07:34 15 indictment.

16 So does the government have a breakdown of
17 that nature?

18 MS. BACON: Yes, Your Honor. In total, Your
19 Honor, there are approximately 44,290 completed sessions.
15:07:49 20 And of those sessions, some may be duplicates. For example,
21 if someone left a voice mail message, that could be session
22 1. Someone retrieving the same voice mail message is
23 session 2, but approximately 44,290.

24 Of those, upon an initial review by the
15:08:07 25 agents, they identified approximately 8,168 pertinent calls.

1 And by that, the government is not representing that there
2 aren't more pertinent calls or that each is pertinent; but
3 that is just the categorization given by the agents at the
4 time of the review.

15:08:26 5 THE COURT: Okay. And then do you have a
6 further breakdown of how many calls would have been
7 implicated due to any adage charges in the superseding
8 indictment?

9 MS. BACON: I am not sure what I understand --
15:08:42 10 I'm not sure if I am understanding your question completely.

11 THE COURT: You've added some conspiracies in
12 the superseding indictment and taken away some conspiracies
13 in the superseding indictment. Maybe I can be more explicit
14 in my questioning.

15:08:55 15 And I am asking if you -- the government has
16 any idea of how many calls then additionally from the time
17 that the original indictment was filed -- it implicated a
18 certain number of calls that were pertinent. Then the
19 superseding indictment was filed. Some matters removed;
15:09:16 20 some conspiracies were removed, some added. The ones that
21 were added, how many more calls would you estimate might be
22 involved or in that?

23 MS. BACON: The 8 ,168 pertinent calls are
24 calls pertinent to all of the criminal conduct, both what
15:09:37 25 was charged originally, the superseding and perhaps other

1 uncharged criminal conduct. So the 8,168 was not solely
2 limited to only the initial indictment. In fact, some of
3 these have nothing to do with Defendants Dimora or Gabor.
4 They could have been pertinent because of something that
15:09:59 5 Kevin Kelley did or Steve Pumper or some other person.

6 But to say that each of the 8,168 calls is
7 pertinent because of these defendants is not an accurate
8 statement.

9 THE COURT: All right. Would the answer then
15:10:11 10 be there are no more calls implicated than -- implicated
11 originally or pertinent to the best -- I understand that --

12 MS. BACON: There are none added to this
13 number, but to say originally the government contemplated
14 using X amount of calls at the original trial, there are
15:10:30 15 different calls that will be added to our exhibit list
16 because of the superseding indictment.

17 THE COURT: Okay.

18 MS. BACON: So, for example, on the Melaragno
19 scheme, I believe there are only two additional calls.

15:10:41 20 THE COURT: Okay. That's the type of
21 information.

22 MS. BACON: But they would be included --
23 those two calls would have been included in the 8,168
24 pertinent calls.

15:10:51 25 THE COURT: I see.

1 MS. BACON: The removal of the Skuhrovec
2 scheme eliminated quite a number of calls. Originally, we
3 contemplated using approximately one to two dozen calls
4 related to that scheme that are gone.

15:11:05 5 So that eliminated pertinent calls that would
6 be government's trial exhibits.

7 The Randazzo count would probably add about a
8 dozen calls, Your Honor, give or take, depending on how we
9 choose to present the evidence and we haven't identified
15:11:27 10 each of our exhibits yet so they probably wash each other
11 out, those two schemes.

12 THE COURT: Okay.

13 MS. BACON: I don't believe there are any
14 additional calls we would use because of the tax scheme
15:11:43 15 because the tax is based on all of the other substantive
16 counts, so the top of my head right now, I can't think of
17 any additional calls that would be required because of that.

18 There are no additional calls related to Mr.
19 Gabor's divorce scheme or his job buys that are some of the
15:12:07 20 RICO predicate acts that were cited in the 1962(d) count.

21 But there may be a dozen calls approximately
22 that relate to the RICO conspiracy only that don't relate to
23 other schemes. But, again, because we haven't completed our
24 trial exhibit list, that's just an approximation.

15:12:29 25 THE COURT: Sure. Now, you've talked in terms

1 of 8,168 pertinent calls. Have those been identified in any
2 way for the defendants?

3 MS. BACON: Yes, Your Honor. In the index
4 they received, they received a detailed index of the call
15:12:48 5 session, number, the date, the time of the call, the
6 duration of the call, I believe the call participants, and
7 initial characterization of whether or not it was pertinent
8 or nonpertinent understanding that there could be
9 nonpertinent calls that are pertinent, or are pertinent in
15:13:09 10 certain respects, not trial exhibits, but generally it's a
11 way to segregate between --

12 THE COURT: So all the calls have been
13 demarcated in some fashion, pertinent versus nonpertinent.

14 MS. BACON: Yes, Your Honor.

15:13:22 15 THE COURT: So is that the only designation
16 given?

17 MS. BACON: I believe some may have also been
18 designated as potentially privileged, intercepted but marked
19 as privileged so appropriately --

15:13:40 20 THE COURT: Which the government would not be
21 using?

22 MS. BACON: Yes, Your Honor, clearly.

23 THE COURT: I think it's fair to say.

24 MS. BACON: Yes.

15:13:46 25 THE COURT: That's one thing we can agree on

1 for certain.

2 So we're talking about -- let's talk about the
3 superseding indictment then if I was listening closely. No
4 more than or -- you mentioned two dozen calls as they relate
15:14:04 5 to -- I am sorry, one dozen as it relates to the RICO, and
6 one dozen as it relates to Randazzo.

7 MS. BACON: Approximately, Your Honor, yes.

8 THE COURT: Perhaps two additional calls as it
9 relates to Melaragno.

15:14:23 10 MS. BACON: Yes, with respect to those
11 Melaragno calls, they also overlap into the obstruction
12 count. That's why I hesitate a little there, because they
13 could have been included in the supercede -- in the original
14 indictment under the obstruction. But they also
15:14:34 15 specifically relate to the Melaragno counts of the
16 indictment.

17 THE COURT: All right. Does the government
18 intend to provide transcripts of any of the pertinent calls?

19 MS. BACON: We intend to provide transcripts
15:14:51 20 well in advance of trial of the calls that we intend to use
21 in our case in chief.

22 THE COURT: Okay. And when will you make that
23 -- I know it depends upon the trial date; but let's say
24 hypothetically the trial date were September 12, how far --

15:15:07 25 MS. BACON: May I have one minute to consult

1 with the case agent?

2 THE COURT: Sure.

3 MS. BACON: Your Honor, we think we could have
4 the majority, substantial majority of that project completed
15:15:34 5 by the end of July.

6 THE COURT: Okay. And that's -- you're
7 indicating end of July is your determination of what you --
8 what the government intends to use at trial?

9 MS. BACON: Together with the transcripts.

15:15:50 10 THE COURT: Together with transcripts?

11 MS. BACON: Yes, Your Honor. We could earlier
12 than that identify the session numbers, if that would be
13 helpful, but to have the completed transcripts and have them
14 in a substantially completed form that would require some
15:16:02 15 additional time.

16 THE COURT: Now, I know I hesitate to ask this
17 question, and I am certainly not going to hold you to it, do
18 you have any concept, any idea whatsoever of how many calls
19 might be involved? I know I am not certainly going to hold
15:16:22 20 you to it because it is -- I don't want to say it's early on
21 because it's not early on.

22 The indictment was filed in September, and
23 it's already May, so substantial time has already elapsed
24 relative to this case and this matter. So do you have any
15:16:41 25 idea? If you don't, that's fine, of how many calls may be

1 used by the government and, therefore, identified to the
2 defendants?

3 MS. BACON: Yes. We haven't counted all of
4 the calls. I can't give you an exact number. We can
15:17:11 5 certainly say there are a number of calls that were charged
6 in the indictment, and certainly all of those we would
7 anticipate having as trial exhibits.

8 So as a starting point, the number of calls
9 listed in the indictment which obviously has been public for
15:17:25 10 now quite some time. It's difficult to give you an accurate
11 estimate at this point.

12 THE COURT: No, I understand -- I can
13 appreciate this.

14 MS. BACON: There's a number above and beyond
15:17:38 15 what is charged in the indictment. As we have in the
16 previous trials, we will be trying to clip the calls because
17 many of them are very long to only the most relevant
18 portions of the calls.

19 THE COURT: Okay. Now, you also indicated in
15:17:49 20 your briefing that these are in searchable format. Can you
21 describe what that means?

22 MS. BACON: Yes, Your Honor. All of the
23 discovery has been -- I should not say all, but vast, vast
24 majority have been scanned. There are some items that are
15:18:07 25 too bulky to scan, or tangible items, for example, a framed

1 artifact of sorts which clearly can't be scanned.

2 But they have been scanned and provided on a
3 disk, and the way it works is similar to a Google search or
4 a Westlaw search, where you can type in a word and you can
15:18:23 5 have a list then of all the documents that hit on that
6 particular word.

7 For example, if the defendant was interested
8 in searching for anything related to Vandra Brothers
9 Construction, one could type in Vandra and all of the items
15:18:36 10 with Vandra Brothers would come on to the screen, and from
11 there you can see where in the document that term is
12 located.

13 THE COURT: Okay. Now, as to Mr. Gabor, I
14 mean, in the superseding indictment, he is charged in the
15:18:58 15 RICO count plus six other counts, correct, if I've
16 identified these?

17 MS. BACON: I believe there are two related to
18 Steve Pumper, a substantive count and a conspiracy, the
19 obstruction conspiracy, the Gallucci mail fraud conspiracy
15:19:40 20 which was the prior indictment that was reincorporated back
21 in that was joined into this indictment, the January 2012
22 trial that was merged into this. I believe there may have
23 been two counts related to that, so that would be six.

24 THE COURT: So --

15:19:57 25 MS. BACON: I believe you're correct, Your

1 Honor.

2 THE COURT: I have -- and, of course, Count 1,
3 which is the RICO count. Count 17, I don't know if you have
4 the indictment before you.

15:20:10 5 MS. BACON: I don't have a copy of it here,
6 Your Honor.

7 THE COURT: And, of course, his counsel is
8 here, and I would think he would ought to know if I have
9 this accurate. So Count 1, Count 17, Count 19, Count 21,
15:20:27 10 and Count 28, 31 and 32.

11 Mr. Christman or --

12 MR. OAKLEY: Your Honor, I believe that's
13 correct in terms of the ones he's specifically indicted
14 under; however, the RICO conspiracy incorporates virtually
15:21:01 15 every count of the indictment, and there's a number of
16 counts of the indictment where he is mentioned as aiding and
17 abetting or assisting in some manner without any greater
18 specificity and we haven't had a response to the Bill of
19 Particulars that we filed, so we really don't know.

15:21:22 20 THE COURT: Let's just go one step at a time.
21 He's actually named in seven counts. The first one being
22 the RICO and the remaining six are the ones that I just
23 identified, 17, 19, 21, 28, 31 and 32, correct?

24 MR. OAKLEY: I believe that is accurate.

15:21:42 25 THE COURT: Do you have a response to his

1 counsel's statement regarding the RICO then involving Mr.
2 Gabor in each and every other count?

3 MS. BACON: Your Honor, he is correct. That
4 is part of the RICO conspiracy. The government has to prove
15:21:57 5 that Defendant Gabor agreed that one member of the RICO
6 conspiracy would commit two acts of racketeering.

7 And the government has cited as potential acts
8 of racketeering not only the specific acts in Count 1, which
9 are his -- the job buy and the divorce fraud, but also the
15:22:18 10 other counts in the indictment with the exception of the
11 count related to Landerhaven, which is not included in the
12 RICO conspiracy. So he is right with respect to that.

13 I'm not aware of Mr. Gabor being charged as an
14 aider and abettor in other counts just because he is
15:22:37 15 mentioned in them. I mean, clearly if he's not charged in
16 the charging language, he's not -- if he's not named in the
17 charging language, he's not charged with that count. And
18 certainly, while he's mentioned perhaps in the manner and
19 means and that may give notice to the defendant as to how he
15:22:53 20 agreed that one or more conspirators would commit two acts
21 of racketeering, that's not a substantive count against
22 which he has to defend.

23 So I think we're talking a little bit past
24 each other here. For the RICO conspiracy, we don't actually
15:23:06 25 have to prove that he committed two racketeering acts or

1 that someone else committed two racketeering acts, only that
2 he agreed that someone in the conspiracy would commit two
3 acts of racketeering.

4 THE COURT: Okay.

15:23:20 5 MR. OAKLEY: Your Honor, if I could respond?

6 THE COURT: Yes.

7 MR. OAKLEY: Counsel for the government said
8 that those are not substantive counts that he has to defend
9 against; however, under the RICO statute, if he's found
10 guilty of having agreed to participate in these acts, he's
11 going to prison.

12 So I would say those are substantive acts he's
13 got to defend against because every single count in the
14 indictment with the exception of maybe six could send him to
15:23:44 15 prison if he's found to have somehow conspired to
16 participate.

17 And only to the fact that there's an honest
18 services act claim, we don't know if Mr. Gabor picked up the
19 tip at Delmonico's, if that's going to be one of his two
15:24:01 20 parts of the conspiracy to send him to prison. So this is
21 an open-ended indictment and it is really quite impossible
22 right now to tell exactly what my client is charged with
23 having done.

24 THE COURT: You're saying that this 149-page
15:24:34 25 indictment doesn't specify the charges against your client?

1 MR. OAKLEY: It specifies the charges, but it
2 doesn't specify things like a time or a manner. Some of
3 these he's alleged to have showed up and played cards at a
4 condominium. I don't know if the government's
15:24:55 5 interpretation of honest services would include that as
6 being a potential agreement to engage in the RICO
7 conspiracy. That's part of the reason we filed the Bill of
8 Particulars so we would have a better idea of what exactly
9 of these charges my client was actually conspiring to be
15:25:12 10 part of.

11 You know, as the government stated, there's
12 the RICO count. There's the six substantive charges.
13 There's the two parts in the RICO, the two specific
14 predicate acts mentioned in the RICO charges, and then
15:25:26 15 there's anything else they might think of he may have been
16 with and they're being very coy about whether or not there
17 is anything there or not because they're not required to
18 until they give us the 302s.

19 But that puts us in the difficult position.
15:25:40 20 And we have to look at, I mean, there's 44,000 calls
21 mentioned.

22 THE COURT: Let's correct that for the record.
23 Somebody misstated in the briefing that there were more
24 calls than that, and that was why I wanted that clarified
15:26:00 25 early on.

1 You would agree that the number of calls total
2 is closer to the 44,000 number than I believe it was 65,000
3 number mentioned in the briefing?

4 MR. OAKLEY: Your Honor, I will have to
15:26:20 5 confess to being uncertain as to which number is more
6 accurate. I didn't do the count for the 44 or 65,000.

7 THE COURT: You what?

8 MR. OAKLEY: I did not personally count them
9 to be able to say they're either 44,000 or 64,000.

15:26:36 10 MS. BACON: Your Honor, I might be able to add
11 some clarity to this.

12 The 44,290 are the number of completed calls.
13 There are some sessions where for some reason the call was
14 disconnected or sometimes there's a duplicate session for
15:26:48 15 one call or the call malfunctions. So when you look at a
16 list of session numbers, it could be the 66 or 65,000
17 number, but in terms of number of complete conversations
18 where there's voice over the interception, it's 44,290.

19 MS. WHITAKER: I am the one that put that
15:27:09 20 number in the briefing, and I based that, Your Honor --
21 obviously, at this moment, we have not listened to all
22 64,000. So until we listen to them, we don't know what is,
23 in fact, a completed call, what is a malfunction call. We
24 certainly found some that are malfunction. We communicated
15:27:23 25 that to the government. But the 64,000 is the number of

1 total recorded sessions we've been provided. Until we
2 listen to them, we don't know which of those are the 44,000
3 that are actually completed calls.

4 So that number came from me, and I think it's
15:27:37 5 accurate on the number of recorded sessions we need to
6 review.

7 THE COURT: Are those ones calls that are not
8 completed and, therefore, have no recording identified? Did
9 you hear what counsel just argued?

15:28:00 10 MS. BACON: Yes, Your Honor.

11 MS. ROWLAND: If we can have a moment.

12 THE COURT: Yes.

13 MS. BACON: Your Honor, the case agent is
14 informing me that the completed calls are identified all on
15:28:11 15 the index that I described earlier with the session number,
16 the date, the time, the duration, pertinent, nonpertinent
17 and the participants. From the index, it should be clear
18 which are the completed calls.

19 THE COURT: The ones that are not completed
15:28:25 20 are just hang-ups or not recorded, no voices?

21 MS. BACON: There are a number of reasons why
22 they can be malfunctions, Your Honor, and through the --
23 there's not one answer as to why they are malfunctions, but
24 there's nothing there to listen to.

15:28:42 25 THE COURT: Those are not included in the

1 index?

2 MS. BACON: No, they are not on the index.

3 THE COURT: But they were given to the
4 defendants?

15:29:04 5 MS. BACON: The way that the transfer of data
6 worked, Your Honor, it would be on the disk, the actual
7 malfunction session or session that doesn't have
8 conversation in it, but it wouldn't be on the index. So we
9 couldn't, as we were driving the data over, remove all of
15:29:20 10 the calls that were malfunctioned; but by going through the
11 index, you can cross-reference and see the calls on the
12 index that's completed and click on the corresponding audio
13 file.

14 THE COURT: So if it's not in the index, it's
15:29:35 15 fair to say there's nothing on that session?

16 MS. BACON: Yes, Your Honor.

17 THE COURT: Okay. Why then, Ms. Whitaker,
18 would you listen to a call that doesn't have anything
19 recorded?

15:29:49 20 MS. WHITAKER: Well, first, if I may, we were
21 provided with a disk that was all the Title III recordings
22 that were taken in this case. That's what we began to
23 review. That's what --

24 THE COURT: Did you look at the index?

15:30:00 25 MS. WHITAKER: We do have an index. And it

1 indicates some pertinent and nonpertinent calls. This is
2 the first time that's why some things were not on the index
3 and some things were on the index.

4 THE COURT: Did you see a pattern developing
15:30:13 5 where if the call wasn't on the index, there was no
6 information on the call that was recorded?

7 MS. WHITAKER: Every time I am opening a call,
8 I'm not also checking the index, Your Honor. That would add
9 minutes to every single call. I am listening to the calls
15:30:25 10 that are on the disks that were provided to me. I have not
11 every time I open a call do I go into the separate index,
12 open it up, find that session.

13 THE COURT: Are you randomly listening to
14 calls then? I don't understand how you would -- you're
15:30:36 15 telling me that this is the process that you're undertaking
16 to review this information, but there's got to be a rhyme or
17 reason to the way you're doing it. And are you just
18 randomly opening calls and that's how you're pursuing it
19 without cross-referencing it on the index?

15:30:52 20 MS. WHITAKER: The index, Your Honor, only --
21 for example, there's a disk of calls from Mr. Dimora's home
22 phone. I am listening to all the calls on Mr. Dimora's home
23 phone. There's no reason for me to look at the index while
24 I'm listening to all the calls of the Mr. Dimora's home
15:31:10 25 phone. All that tells me is that it's from his home phone,

1 how long it is. The government has indicated they marked
2 pertinent and nonpertinent, but as they have said here, you
3 can't be guaranteed if it's pertinent, it says pertinent,
4 it's not pertinent, it says not pertinent. In fact, we were
15:31:24 5 required to sign a waiver saying we wouldn't rely on what
6 the government has identified at pertinent and nonpertinent.

7 So certainly we're not using the index for
8 that. There really is no reason. There are times when I've
9 been looking for specific calls on specific issues where,
15:31:39 10 yes, I do go to the index. I find the call I am looking for
11 and I go to the disk.

12 But when I am listening to all Mr. Dimora's
13 calls, all Mr. Dimora's calls from his cell, all Mr. Russo's
14 call from a time period that is relevant, I just have the
15:31:54 15 disk out and I am listening to the entire disk because
16 there's nothing -- there's no reason for me to be going to
17 that index. I need to listen to all the calls that were
18 provided on those certain phones or from another person's
19 phones during a certain time period.

15:32:08 20 THE COURT: So you're choosing to listen to
21 sessions that have no information on it?

22 MS. WHITAKER: As I said, until sitting here
23 today --

24 THE COURT: Which you wouldn't hear anything?

15:32:19 25 MS. WHITAKER: No, I don't hear anything, but

1 it takes 16 seconds simply to open up a call before I even
2 know there was no information. Certainly if I immediately
3 hear a dial tone, I stop listening because I know there's
4 nothing there.

15:32:33 5 Sometimes you open it up and you don't hear
6 anything for a while because there isn't anything on it.
7 Sometimes you open it up and you don't hear anything for a
8 while because it takes a while for them -- the equipment to
9 go. Sometimes you open it up and you don't hear anything
15:32:44 10 for a while because people don't start talking for a moment
11 or two.

12 I mean, I am opening these sessions up, on
13 especially Mr. Dimora's home and his cell, and I need to
14 review them all and then, again, like I said, during certain
15:32:57 15 specific time periods referenced in the indictment, I have
16 an obligation to listen to these phone calls not just single
17 one isolated in the indictment, but what was happening
18 around that time, what was going on around that time.

19 That's how I am proceeding with reviewing this
15:33:11 20 discovery. I don't know that there's any other way to do it
21 to assess the circumstances in which these charges are being
22 made.

23 MS. BACON: Your Honor, just to clarify
24 perhaps one misunderstanding. At the time the government
15:33:26 25 gave the discovery, Agent Massie and other members of the

1 prosecution team sat down and explained the index, the
2 calls, the idea of the malfunctioning calls, explained why
3 there would be some absence of -- why there's a disconnect
4 between a hard drive and the chart.

15:33:43 5 If it would help, we've never been asked to
6 provide, but we could provide next week an index of all the
7 malfunctioned calls if that would facilitate the review.

8 MS. WHITAKER: I did sit down with them and we
9 did talk about the fact there were some problems with some
15:33:57 10 calls. I don't remember if I was told that. Again, there
11 was a whole list of calls that they had isolated that were
12 malfunctioned. Again, I was provided disks that were Title
13 III discovery in this case and I began --

14 THE COURT: All right. So if the differential
15:34:13 15 between your number and your brief and their number they
16 represented today, the government's number is 20,000 calls
17 that have malfunctioned and have no information on that,
18 wouldn't you want to know that so you didn't open that up
19 and take 16 seconds to do that?

15:34:26 20 MS. WHITAKER: I mean, if they can give me a
21 list of malfunctions.

22 THE COURT: I think that's what the government
23 just said.

24 MS. WHITAKER: That would be helpful.

15:34:34 25 THE COURT: That eliminates 20,000 sessions.

1 MS. WHITAKER: That eliminates 20,000
2 sessions, but it does not eliminate --

3 THE COURT: Well, actually 22,000 sessions.

4 MS. WHITAKER: It does. I would imagine from
15:34:44 5 what the government is telling me is those 22,000 sessions
6 don't have any recording. It does not affect the total
7 hours of recording that we also identified in our brief.

8 Am I correct about that?

9 MS. BACON: That should be correct, Your
15:35:02 10 Honor.

11 MS. WHITAKER: So there's still 1,600 hours.

12 THE COURT: That's only if you choose to
13 listen to calls that are not pertinent --

14 MS. WHITAKER: Again, Your Honor --

15:35:13 15 THE COURT: -- and don't come into the time
16 frame that's relevant as you've described it?

17 MS. WHITAKER: Again, Your Honor, the
18 government is the one who's identified pertinent and
19 nonpertinent in the index. They made us sign a waiver that
15:35:24 20 we would not rely upon that in any kind of court filing or
21 statements. They said here today on several occasions that
22 they can't guarantee it was pertinent, it's not pertinent.
23 So I think that we cannot rely on the fact that the case
24 agent has identified what he considers to be pertinent and,
15:35:43 25 therefore, we don't need to listen to these nonpertinent

1 calls.

2 Obviously, pertinent for them would be more
3 intending to be inculpatory. I think I may have a very
4 different perception of what I consider to be exculpatory
15:35:56 5 pertinent phone calls. I don't think I can effectively
6 represent my client and rely on Agent Massie, as diligent as
7 I know he is, representation of what is in his opinion a
8 pertinent call in defending my client. So I do need to
9 listen to the calls that we've been provided.

15:36:13 10 As the court is aware, the time frame for the
11 RICO is certainly far greater than we've got the recordings
12 for. The recordings we have go --don't start until 2008 and
13 end -- you know, when this investigation was culminated in
14 the indictment. That's not a long time period. There
15:36:32 15 certainly was many, many things in the indictment happening
16 during that time.

17 MR. OAKLEY: If I could say one thing about
18 the pertinent calls. I began my review of the wiretaps by
19 looking at the indictment and the Title III affidavit and I
15:36:48 20 found at least two calls in the indictment that are
21 specifically mentioned relating to my client that were not
22 listed as pertinent in the index that I have. So I gave up
23 relying on the index, because it's not trustworthy.

24 The government won't even stand behind it and
15:37:04 25 I am certainly not going to rely on it for representation of

1 my client.

2 THE COURT: Okay. I found the number that was
3 cited in the brief is 64,237?

4 MS. WHITAKER: Yes.

15:37:28 5 THE COURT: Recorded conversations is what the
6 brief says. We now can agree that those are not recorded
7 conversations, correct?

8 MS. WHITAKER: Based on the representations
9 from the government, apparently there are many of those
15:37:39 10 recorded sessions we received have no voice on them. So I
11 would just simply refer the court to the total hours of the
12 recordings, and that would cover the 44,000 or whatever
13 number the court -- the government says actually has a voice
14 on them.

15:37:52 15 THE COURT: Okay.

16 MS. WHITAKER: If I can clarify, when they say
17 malfunction calls, does that mean it was a call that was
18 dropped, or were you guaranteeing on these 22,000 calls
19 there's no voice at all?

15:38:10 20 MS. BACON: There could be a variety of
21 different things happening. Some could be text messages
22 which we are not authorized to intercept and so they come up
23 with the session but we don't have a content because it was
24 a text. It could be an equipment malfunction. It could be
15:38:24 25 a problem with the phone company. There could be many

1 different things. I hate to limit it to one because there
2 are a variety of reasons.

3 MS. WHITAKER: I understand what you're saying
4 about the reasons. There are a variety of reasons for the
15:38:35 5 malfunction. What I am looking for --

6 MS. BACON: There's no audio.

7 MS. WHITAKER: There's no audio whatsoever on
8 these 22,000?

9 MS. BACON: So it's not a hello, hello and the
15:38:43 10 other person can't hear. That would be included in the
11 44,290.

12 MS. WHITAKER: So the 44,000 calls, that
13 represents the nearly 1,600 recorded conversations?

14 MS. BACON: Correct.

15:38:54 15 THE COURT: When were these sessions, again,
16 provided to the defendants?

17 MS. BACON: Defendant Dimora received it on or
18 about February 24, Your Honor, and I believe Defendant Gabor
19 received it around December 20 of last year.

15:39:20 20 THE COURT: And Defendant Dimora received it
21 in February because of the situation involving --

22 MS. BACON: Involving his counsel, Your Honor.
23 It took until February -- I believe February 2 was the
24 hearing in Akron before Your Honor where the Whitakers
15:39:37 25 discussed their representation and we organized that they

1 would be the counsel of record going forward. That took a
2 while. And then the government met with the Whitakers
3 almost immediately thereafter and began discussing the
4 protective order, the discovery plan, et cetera.

15:39:55 5 MS. WHITAKER: For the record, I will note
6 that previous counsel had been on for quite some time and
7 had not signed the protective order. There were -- it
8 wasn't so they weren't communicating. There were issues
9 they were trying to address. As soon as we got on board, we
15:40:10 10 preliminarily agreed because we wanted to get started on the
11 discovery. So we got it and started as soon as we possibly
12 could.

13 THE COURT: Okay. I guess I will ask the
14 defendants to address the situation that this case, and I
15:41:03 15 think it's reflected in the record, was, of course, filed in
16 September of 2010; and in October, I believe, is when the --
17 thereafter, I think it was October where there was a date
18 set for the trial. And there was contemplation of a
19 superseding indictment and, thereafter, that was built in to
15:41:44 20 the selected trial date of September 12.

21 And my question is, the argument is, well, a
22 90-day continuance isn't that long given the RICO; but it's
23 a 90-day continuance plus the original continuance that was
24 factored in from originally a day of July, I believe, so
15:42:17 25 it's July to September built-in continuance, plus a

1 continuance of 90 days that really translates to a
2 continuance of 120 days, because a continuance of 90 days as
3 everybody knows in this room is right in the middle of
4 December, and if you're suggesting that I start the trial
15:42:37 5 right in the middle of December, I don't think anyone has
6 suggested that. So it's really you're suggesting I start it
7 in January, which is not a 90-day continuance. It's 120-day
8 continuance beyond the original three-month or 90-day
9 continuance already built into the schedule.

15:43:00 10 So knowing that, I need to know what justifies
11 that kind of continuance.

12 MR. CHRISTMAN: Your Honor, may it please the
13 court. Leif Chrstiman on behalf of Michael Gabor. Your
14 Honor, I was appointed to represent Mr. Gabor a couple days
15:43:18 15 before that -- before that hearing and I don't remember
16 specific dates as it was late last fall.

17 When I accepted the appointment, certainly,
18 Your Honor, I had no idea of the volume of discovery. And,
19 you know, discussing the calls that the court just gone
15:43:36 20 through, that's nothing to say about the other physical
21 documents that have been provided to us to review, as well.
22 And I think that should be part of the equation whether the
23 court is considering the continuance.

24 To ask the government about the specific
15:43:54 25 documents, you know, all the scanned material, you know, I

1 think I mentioned previously about having an external hard
2 drive that's capable of handling two terabytes, and the
3 hundreds and if not millions of documents that have been
4 provided, that's not went in the equation when I agreed to
15:44:14 5 accept the appointment on this case. Those dates have been
6 set prior to my accepting the appointment to the case.

7 THE COURT: I guess that's -- that's a point
8 we need to address. You accepted the case knowing what the
9 dates were.

15:44:28 10 MR. CHRISTMAN: Without having any of the
11 discovery to make, you know, an intelligent knowing decision
12 on that.

13 THE COURT: Well, when did you get the
14 discovery?

15:44:39 15 MR. CHRISTMAN: I got it December 23.

16 THE COURT: When did you move for a
17 continuance?

18 MR. CHRISTMAN: After the superseding
19 indictment.

15:44:45 20 THE COURT: Precisely. What has changed
21 between then when you never asked for a continuance in
22 December or January or February or March to when you did ask
23 for a continuance?

24 MR. CHRISTMAN: Your Honor, I briefed those
15:44:59 25 issues and what I put in there would be that fact of the

1 RICO indictment, and what Mr. Oakley was touching on
2 earlier, opens up the universe so the information that we've
3 been provided that I have a duty and obligation to review in
4 order to be prepared to go to trial. I think that
15:45:20 5 previous -- on previous indictment could have
6 compartmentalized the information and, you know, looked at
7 various portions that would have relayed to specific
8 charges.

9 But I think with the RICO indictment, Judge,
15:45:31 10 you know, I have an obligation for a much broader universe
11 of the information that's been given me to review and
12 prepare for trial.

13 THE COURT: Ms. Whitaker?

14 MS. WHITAKER: Just a few points, Your Honor.
15:45:45 15 In terms of the court's inquiry about why no -- you know,
16 obviously, nobody knows the size of the discovery when they
17 initially get the case. If it turns out that they're going
18 to need some more time, as the government just in another
19 case they have, they then move the court for additional time
15:46:02 20 based on the complexity of the case, based on the volume of
21 discovery. So I don't know that at the time anybody
22 originally signs on that they ever know the answer to that
23 question.

24 I think the -- I know I had discussions with
15:46:13 25 Mr. Christman prior to the RICO coming out that it would be

1 somewhat immature and premature to file a motion to continue
2 until we got the RICO indictment.

3 As the court knows, we were hoping to get it a
4 little earlier. We were waiting -- he was waiting for my
15:46:26 5 discussions with him until he got the RICO indictment so he
6 can make an informed complete single, one-time to the court
7 a motion to continue if that was necessary.

8 In terms of what Mr. Christman says about the
9 need to look at the documentary, yes, I think that's
15:46:43 10 obviously very important. If the court is looking to get an
11 assessment of the total world of discovery we've been
12 provided --

13 THE COURT: You certainly can address it.
14 That's why we're here.

15:46:52 15 MS. WHITAKER: Yeah. I appreciate the court
16 giving us an opportunity to do that.

17 We have been pro -- the government is correct.
18 There are some items that are not contained in the disk that
19 we've been given. I don't know that I would go far as to
15:47:05 20 say there are a few; things are just too bulky. This is the
21 index of items that are not included in the discovery. Some
22 of these items include computers, so we're not -- parts of
23 evidence from search warrants, so we're not talking about a
24 few big pictures of blueprints.

15:47:21 25 We're talking about a large volume of

1 information that is not also included in the huge volume of
2 information provided on the two terabyte hard drive.

3 So it's not a minimal -- it's certainly not a
4 minimal. For example, they're divided into different
15:47:39 5 sections, and by far, the biggest section, so I'm not trying
6 to claim that all of them are big, but by far the biggest
7 section is the 352 gigabits. That contains, Your Honor,
8 2,476,000 some files. Now, everything is duplicated.
9 There's two of everything in there. So it really means that
15:48:00 10 there are 1,240,000 files on this one section of discovery.

11 We are talking about an incredible, an
12 incredible volume of discovery to review in addition to the
13 recordings. And until you get that handed to you, there's
14 simply no way to contemplate the amount of time it's going
15:48:21 15 to take to go through that. We're certainly also not
16 discussing here any Jencks material or any other material we
17 haven't received yet. Obviously that will add to that.

18 But just in terms of giving the court an
19 overview of the amount of discovery that we simply have to
15:48:38 20 go over.

21 In terms of the exploring the idea that this
22 was originally going to be set in July, and then September
23 was chosen because it's such a more complex case, obviously
24 we weren't involved in the case. If I had been, I certainly
15:48:54 25 would have said a month and a half, which is really what

1 that is, it wasn't the whole month of July, whole month of
2 August, whole month of August, who month of September. It
3 was a much more limited, I believe, time that was factored
4 in there. I just don't think even that was enough to
15:49:07 5 account for the complexities.

6 THE COURT: Maybe 60 days.

7 MS. WHITAKER: I just don't think it was
8 enough to account for the complexities of this case.

9 As I mentioned in one of our briefing that the
15:49:20 10 court's local rules provides 24 months.

11 THE COURT: You know, I don't argue the civil
12 rules. The civil rules of discovery are very vastly
13 different than the criminal rules. You know that; I know
14 that. So we're not going to go down that path because it's
15:49:43 15 not very persuasive.

16 MS. WHITAKER: I apologize. I just thought
17 this was document intensive. That's why I referred to those
18 more related. Certainly won't argue it if the court is not
19 interested in hearing it.

15:49:56 20 THE COURT: I'm not interested in hearing it
21 because unless you're going to have your client sit for
22 deposition in this case like defendants are required to do
23 in civil cases, then it's just clearly not pertinent.

24 MS. WHITAKER: We're certainly not going to do
15:50:10 25 that.

1 THE COURT: Okay. It's not pertinent, and we
2 would agree.

3 MS. WHITAKER: In terms of, you know, we
4 received the discovery as they indicated end of February.
15:50:18 5 As I am sure, I will hope the government can attest, they're
6 well aware that we are jumped right in and started. We
7 filed several letters. Every time we have come up with a
8 problem, an issue with discovery, which there have been
9 several, we've contacted them.

15:50:33 10 They've been very expedient in getting back to
11 us, but, again, we don't know about these issues until we
12 get them. It wasn't until I was sitting here today that I
13 knew I could eliminate 22,000 recordings.

14 THE COURT: I think it's 20,000. I think
15:50:45 15 it's --

16 MS. WHITAKER: 20,000 recordings. And I am
17 certainly very glad to do that. I don't think, however, it
18 doesn't change the numbers that I added in my brief which
19 was we're talking about 1,600 hours of recordings and nearly
15:51:02 20 40-hour work weeks to play those.

21 I understand the court -- maybe I am
22 misunderstanding the court that there's some indication that
23 I might not need to listen to most of those. I disagree
24 that -- that my obligation is to listen to those. This is
15:51:17 25 actually a very discrete period of time in the whole range

1 of the RICO indictment. It is a period of time where all
2 these individuals that were recorded, and I don't think I
3 can say who they are because of the protective order, but
4 the court's aware all these individuals are important
15:51:34 5 players in this case. All their calls just during the small
6 limited time period were recorded. There are a lot of
7 charges that are occurring during this time period.

8 I am looking for both inculpatory, as well as
9 exculpatory information.

15:51:49 10 We were notified there have been two calls
11 listed in the indictment that were noted as not pertinent in
12 the thing, and I don't think that that is by any means any
13 attempt to misrepresent anything by the government. I think
14 it's just dealing with this volume of calls. And that is
15:52:06 15 why we cannot rely on the index to determine which calls we
16 can't listen to and we calls we can listen to.

17 THE COURT: Okay. Thank you. Do you care to
18 respond?

19 MS. BACON: Thank you, Your Honor. A couple
15:52:16 20 of issues about the time frame.

21 Mr. Christman was appointed as counsel for
22 Michael Gabor on November 8, and on November 9, Judge
23 O'Malley issued the trial order that set forth the relevant
24 dates including the trial dates.

15:52:30 25 We met with Mr. Christman on November 29,

1 2010. That was the meeting as stated in our brief where we
2 told him the exact scope of the superseding indictment
3 including that the RICO conspiracy contemplated all of the
4 substantive counts that were in the then current indictment.

15:52:49 5 So as of November 29, 2010, he knew that he
6 had to go beyond the counts -- substantive counts charged in
7 Defendant Gabor and he needed to start preparing for all of
8 the counts.

9 We also told him about the additional schemes,
15:53:04 10 the nature of the additional schemes that would be added and
11 had other discussions, including the fact that he would need
12 to produce a two terabyte external hard drive. He sent us a
13 letter on December 7, 2010, enclosing the internal hard
14 drive for us.

15:53:21 15 As of December 7, there's no misunderstanding
16 about the scope of discovery from Defendant Gabor's
17 perspective. He knew it was going to be two terabytes full
18 of information, and he had all of that material on or about
19 December 23, 2010. So within two weeks of him providing us
15:53:40 20 the signed protective order and the hard drive, he had
21 everything.

22 In terms of Defendant Dimora and the scope of
23 discovery, our notes of the February 2, 2011 in Akron
24 reflect that the Whitakers, Attorneys Whitakers acknowledged
15:53:57 25 that they knew through former counsel, Dick Lillie, the

1 scope of discovery; they were aware of the complexity; they
2 discussed the dates; they are prepared to meet those dates,
3 and they agreed to be bound by those dates.

4 And at that time, Mr. Lillie knew the scope of
15:54:15 5 discovery, because as Ms. Whitaker indicated, we had been
6 having regular conversations about the scope of the
7 protective order and other issues related to discovery, and
8 he actually had some of the discovery through a limited
9 protective order as it related to some contemplated
15:54:30 10 depositions and within that included Jencks material, some
11 material that could be considered as Brady and Giglio
12 material. And they had that as early as November 16, 2010.

13 And I am also informed, Your Honor, that
14 Attorney Lillie actually provided to the government the
15:54:52 15 necessary hard drives to transfer all of the information.
16 So certainly, before the February 2, 2011 hearing, everybody
17 in the Dimora camp understood the size of the discovery, the
18 scope of the indictment, the type of material and even had
19 samples through the material provided on or about November
15:55:12 20 16, 2010 of the type of material we were all contemplating.

21 MS. WHITAKER: May I respond?

22 THE COURT: Yes, please.

23 MS. WHITAKER: Okay. Thank you. First, I
24 would just like to point out that they're correct. Mr.
15:55:25 25 Lillie was given some discovery. And I have not even

1 included any of that discovery in the numbers that I'm
2 talking about here because it was received early on and I
3 didn't think it was fair to include that in the volumes of
4 discovery we need to review. But that is in addition --
15:55:38 5 what she's talking about is in addition to all the things
6 I've informed the court of.

7 In terms of this switching the lawyers, I
8 think it's important to point out and I understand the court
9 -- or I am sensing a concern that it was the problem with
15:55:52 10 the lawyers that did not let us get involved until February.
11 It's important to point out that Mr. Lillie sought to stay
12 on this case. He asked to be appointed to the case. They
13 went out looking to switch a legal team midway. Mr. Lillie
14 sought to be appointed.

15:56:09 15 The court was very well aware of Mr. Dimora's
16 many attempts to obtain a loan on his home. Those were
17 unsuccessful until we were able to make further negotiations
18 with the government and the court declined to appoint Mr.
19 Lillie.

15:56:23 20 So that I think is important to note that it
21 wasn't as if it was just a wholesale decided to delay things
22 by switching lawyers. Mr. Lillie sought to be appointed in
23 the case, so there would be no break in representation.

24 The court debated -- made the decision not to
15:56:39 25 appoint him and that's why we got involved.

1 In terms of --

2 THE COURT: Wait a minute. The court did
3 appoint counsel. So it wasn't like counsel wasn't
4 appointed.

15:56:49 5 MS. WHITAKER: Right, but it was -- the lag
6 between Mr. Dimora not going with the court's appointed
7 counsel was a week or two. That certainly can't be blamed
8 for any delay in this case. I just -- I want to make it
9 clear that the delay the government refers --

15:57:05 10 THE COURT: You're saying that the situation
11 you worked out with the government relative that permitted
12 you to remain on wouldn't have applied if Mr. Lillie wished
13 to go that route?

14 MS. WHITAKER: I am sure that they -- he could
15:57:19 15 have worked the same thing out. He just didn't.

16 THE COURT: That's the whole point. You are
17 trying to say that the government wouldn't do that. You are
18 alluding or intimating that the government wasn't willing to
19 do that. I mean, they did it for you.

15:57:32 20 MS. WHITAKER: That is not -- if I alluded to
21 that, I apologize, because that is --

22 THE COURT: In other words, if it would have
23 been broached with Mr. Lillie or if Mr. Lillie would have
24 approached, you don't see that would have had any different
15:57:45 25 treatment than you were given?

1 MS. WHITAKER: No. I don't mean to suggest
2 the government wasn't cooperative in this. I think Mr.
3 Lillie did broach the topic with the government. I think he
4 did tried to work this out. I think Mr. Dimora had nine
15:57:55 5 attempts or some number to get funding to retain a lawyer.

6 It just didn't happen, and he kept trying, as
7 the court was aware of it. That's why Mr. Lillie sought to
8 be appointed. The government never withheld any approval to
9 do that.

15:58:09 10 If I intimidated that, I certainly didn't mean
11 to. They've been nothing but cooperative, so I don't mean
12 to allude that at all.

13 The only thing I am trying to do is clarify
14 that there wasn't some sort of attempt to delay by switching
15:58:26 15 attorneys. That's what I wanted the court to understand is
16 that Mr. Lillie --

17 THE COURT: Because there wouldn't have been a
18 delay at all had Mr. Lillie made the same arrangements that
19 you've made?

15:58:35 20 MS. WHITAKER: Well, I think that he closely
21 did. I just think that there was several, several no's from
22 several, several banks before Mr. Dimora was able to get the
23 funding he needed, so I think that he attempted to do both.

24 I think Mr. Lillie was diligent in attempting
15:58:50 25 to get appointed or help Mr. Dimora find funding for

1 retained counsel.

2 MS. ROWLAND: Your Honor, if I might just
3 briefly explain, because the government was a little more
4 involved in that aspect of things.

15:59:01 5 From the beginning, just as Ms. Whitaker just
6 clarified, the government was always willing to subordinate
7 its interest in the forfeiture to a bank so that the
8 defendant could obtain the funds he eventually did obtain
9 and any delays were solely between the defendant and the
15:59:21 10 bank he was dealing with. The government wasn't involved at
11 all other than signing the paperwork along the lines we
12 agreed to do in the beginning.

13 And the reason that discovery did not occur
14 while Mr. Lillie was representing the defendant was simply
15:59:36 15 because I think we can see now in hindsight the relationship
16 had broken down, and although Mr. Lillie was willing to sign
17 the limited protective order so that we could provide the
18 discovery with respect to the Payne deposition that had been
19 anticipated, it got to the point where Mr. Lillie would not
15:59:52 20 sign the protective order for the broader discovery, and
21 that was why we hit an impasse on our ability to deliver the
22 rest of the discovery.

23 THE COURT: Was that issue ever brought to the
24 court's attention formally?

16:00:07 25 MS. ROWLAND: I believe by the time, without

1 checking the record, it's difficult to say with certainty,
2 but I think by the time that became clear, Mr. Lillie had --
3 it was almost simultaneous with his motion to withdraw.

4 THE COURT: Okay. All right.

16:00:22 5 Ms. Whitaker, anything else to add?

6 MS. WHITAKER: If I may just have one second,
7 Your Honor.

8 THE COURT: Sure.

9 MS. WHITAKER: I think that in terms of the
16:00:39 10 recordings -- another thing -- the only thing we've given is
11 the amount of recorded hours, if there was some button to
12 hit to have it play straightforward. Each of these
13 recordings, you know, obviously -- they don't roll from one
14 to the other. You need to go to each one and open each one
16:00:56 15 and that's several seconds to do that, and even with now
16 that I've discovered I only have to listen to 44,000 instead
17 of 62,000 or whatever the number is, we're still talking
18 that in and of itself obviously takes a tremendous amount of
19 time.

16:01:11 20 I just -- we got on this case, and we
21 obviously will and always will abide by the court's
22 deadlines is what you do as an attorney. We have an
23 obligation, however, to inform the court after getting the
24 discovery that we believe as officers of the court as those
16:01:31 25 tasks with giving Mr. Dimora's constitutional effectiveness

1 of counsel, we have an obligation to notify the court that
2 without additional time to review the mass amount of
3 discovery we've been given by the government, we simply will
4 be at a severe disadvantage.

16:01:46 5 It will affect our ability to effectively
6 prepare for trial, and that's why we brought it to the
7 court's attention. If you know, we did not bring it to the
8 court's attention until the government affirmatively
9 represented in its opposition to Mr. Gabor that there was
16:02:00 10 something to be gleaned from the idea that we did not make a
11 motion to continue.

12 We -- once that statement was made, we felt an
13 obligation to inform the court we absolutely think more time
14 is necessary. We think that we are, again, at a grave
16:02:16 15 disadvantage if we don't have time to adequately review the
16 mass amount of discovery.

17 And while I appreciate the knowledge that
18 there are less recordings, it does not affect the hours that
19 I gave the court, and I think that the original time, the
16:02:35 20 original dates, the September date would not have -- the
21 July date certainly would not have adequately allowed time
22 for that and the extra time that was contemplated by the
23 court, nobody had the discovery. Obviously, sure they can
24 tell us there's a whole lot of recordings; there's a whole
16:02:51 25 lot of documents.

1 But until you have that information in front
2 of you, you cannot -- it's just impossible to accurately
3 assess the time necessary to review this information to
4 prepare for trial and that's all we're asking for, Your
16:03:07 5 Honor, is enough time to effectively prepare for trial.

6 THE COURT: You've asked -- you're suggesting
7 90 days. You are, in essence, asking for 120 days, and I am
8 asking you how do you justify the number of days requested?

9 MS. WHITAKER: I mean, quite honestly, Your
16:03:26 10 Honor, I certainly think that we've asked for what we
11 consider to be the limited amount of time. I think we could
12 use any extra time. Obviously, we're not going to ask the
13 court for a year, but we could easily spend that time. So
14 we've -- we've looked at this discovery and determined what
16:03:42 15 is the least amount of time that we can come up with to
16 review this discovery, and that's what Mr. Christman asked
17 for.

18 THE COURT: You've indicated to the court at
19 the last hearing you could be ready -- you could be ready in
16:03:56 20 November was your representation.

21 MS. WHITAKER: What we said to the court in
22 response was we would appreciate any additional time. The
23 court said, could you be ready in November. We said if 60
24 days is all we can get, we will be ready in 60 days.
16:04:09 25 Obviously, if the court denies this motion, we have to be

1 ready in September. But what we're saying is, you know, I
2 agree with Mr. Christman, an additional 90 days is
3 necessary.

4 And, obviously, the government has indicated
16:04:21 5 and the court indicated -- everybody has indicated that does
6 create unworkable time because of the holidays and some
7 trial scheduling issues for the government, I believe, but
8 the number of 90 days is certainly what I would consider to
9 be a minimal amount of what we would need to be necessary.

16:04:41 10 THE COURT: Okay. Mr. Oakley, anything
11 further?

12 MR. OAKLEY: Yes, Your Honor, just briefly. I
13 do want to discuss, because I don't want everybody to be
14 concerned about the wiretaps. In term of the documents,
16:04:51 15 I've worked on several class actions. I am used to dealing
16 with a large number of documents.

17 And, you know, I've looked at -- we have a
18 29-page index of documents which initially seemed pretty
19 helpful. I looked at, for example, the Dimora office.
16:05:04 20 There's 240 files in there. Taking into account the
21 duplicates, that's 148 files.

22 To put a workable index together, because
23 they're not indexed beyond this 30 days, it just tells you,
24 you know, Dimora office, so that index brings me to about
16:05:20 25 maybe 148,000 pages.

1 You know, to properly index that to look at
2 everything, it might take 200 hours, maybe a little bit
3 less, maybe a little more. But then when I look at the
4 Russo office, which is 61 items, I thought it would be about
16:05:36 5 the same, it turns out there's 163,979 files in that. I'm
6 not sure how I am going to manage that because looking at
7 each of those files for only one minute would take 16 months
8 of 40-hour weeks. I am sure I will figure out some way to
9 narrow that down. But, you know, any additional time is
16:05:57 10 going to be helpful just to try to figure out what exactly
11 are in these documents, even narrowing them down to just the
12 absolute bare bones parts of the indictment.

13 The problem is with these documents, what
14 might be relevant is like a salt sprinkled into a bucket of
16:06:16 15 sand. You know, I have to look at everything, and in terms
16 of the auditor's personnel records, there's 195,900 files
17 there. They're divided in 80 folders. I've already figured
18 out I probably only have to look at 25 percent of those.
19 But they are not searchable. They're in a TIP format
16:06:35 20 instead of a PDF format, which means they can't be searched.

21 But they're handwritten and with a PDF format
22 and optical character recognition software, it only picks up
23 very cleanly scanned originally typed information. If
24 something has been handwritten in, it won't come up. And I
16:06:50 25 am not so optimistic to think that only those documents that

1 are relevant to my client are going to somehow have his name
2 on it.

3 There's a lot of documents that, you know, I
4 really need to look through everything to be sure and
16:07:03 5 certainly within that terabyte, there's a lot that doesn't
6 need to be reviewed. But there's still many hundreds of
7 hours that need to be reviewed and that's all got to be done
8 before we get the 302s. Because as soon as we get the 302s,
9 we're not going to do anything else but the 302s and this
16:07:19 10 has to be indexed.

11 I can't just read it once. I've got to index
12 this stuff because if something comes up in a 302 that I
13 have yet to find out about, I need to be able to find it
14 within a couple of seconds. It's not good enough to have an
16:07:32 15 index that keeps you within -- I think I worked out the
16 Russo's office to be somewhere between 10 to 100 million
17 pages of documents. I need to have a much clearer idea.

18 So, you know, any additional time is extremely
19 helpful to be able to effectively prepare this case for
16:07:51 20 trial due to the overwhelming body of documents that we have
21 and the overwhelming number of 302s we will be eventually
22 receiving.

23 THE COURT: Okay. Does the government wish to
24 address the documents as opposed to the wiretaps. It sounds
16:08:07 25 like there's a sizable amount.

1 MS. BACON: There is, Your Honor. The number
2 can be also misleading in terms of the amount of time it
3 takes to review. As Mr. Oakley mentioned, when you get into
4 the auditor's office files, and at risk of violating the
16:08:19 5 protective order, I hate to talk about too many categories,
6 one large category are personnel files. Another very, very
7 large category are property tax records.

8 So you can see when you're reviewing those
9 right away, that's a lot different from a one-page
16:08:34 10 handwritten note that maybe was found on somebody's desk.

11 And that it's easier to say, I want to look at
12 this property and take a look at that particular file,
13 rather than look through a large amount of property tax
14 records.

16:08:46 15 In other cases, a document might be 200 pages
16 long, but it's an employee manual, and it's the same
17 employee manual that was found in five different places. So
18 after seeing one employee manual, it's quite easy to click
19 through. So the number of pages at first blush sounds like
16:09:07 20 a monumental task, but when you start to consider the types
21 of documents, the review actually goes much more quickly
22 than it would be if it was 1,000 single page letters that
23 had to be read.

24 Your Honor, if it is easier for the review, we
16:09:40 25 had made available all of the actual physical, tangible

1 evidence, so to the extent that it takes too long to thumb
2 through the individual files, if defense counsel thought it
3 would be easier to actually see the hard copy documents so
4 you can tell right away if whole boxes are relevant to
16:09:56 5 something they're searching for, that has been and will be
6 an available option. All they have to do is contact us and
7 we can schedule a review of anything on the indexes that
8 they've received.

9 MR. OAKLEY: If I could respond to that point,
16:10:13 10 Your Honor.

11 THE COURT: Sure.

12 MR. OAKLEY: Frankly, I don't see that as
13 being particularly helpful, aside from having to go through
14 arranging a trip of walking into a, I don't know, warehouse
16:10:22 15 full of paper and trying to figure out which bankers box to
16 even start looking at. It will probably be an hour before I
17 would be able to tell whether or not I can accomplish that.

18 Thank you.

19 THE COURT: All right. Let's just consider
16:10:46 20 some potential options and then the court will make its
21 determination so that this case can proceed with some
22 certainty relative to the dates.

23 So one option is obviously to keep the
24 September trial date.

16:11:10 25 The other option is to give a continuance as

1 requested which, in essence, is a continuance to the
2 beginning of January. Even though it's suggested as a
3 90-day continuance, I am certainly hoping that that wasn't
4 disingenuous knowing that the trial could not for many
16:11:30 5 reasons start in mid-December unless of course that truly
6 was your request, and you were indicating that was not.

7 MS. WHITAKER: Your Honor, we did not put --
8 we joined with Mr. Christman.

9 THE COURT: Mr. Christman, were you suggesting
16:11:43 10 that?

11 MR. CHRISTMAN: Your Honor, that was my
12 number, but certainly this court wouldn't think that, you
13 know, there was anything disengenuous about number of days
14 for the continuance or any of the reasons that I put in my
16:11:55 15 various motions for the continuance, Your Honor. Truly,
16 this is a case that has tremendous amount of material to
17 review.

18 THE COURT: I only say that because 90 days
19 takes us -- I mean the month -- there's been an indication
16:12:17 20 that this trial may last as long as three months. Is that
21 correct? Is that still everyone's estimate?

22 MR. CHRISTMAN: When I put that 90-day
23 continuance in, I wasn't thinking September, that puts this
24 day. It really did not cross my mind. What would be the,
16:12:33 25 you know, 90 days from September 12. That wasn't part of

1 any of my thought process, and --

2 THE COURT: Okay. You will -- you admit the
3 math that you really need 120 days, closer to 120 days?

4 MR. CHRISTMAN: Sure. Yes.

16:12:51 5 THE COURT: I'm not suggesting you ought to
6 get that. I am just saying let's just be honest about what
7 we're requesting. You are saying 90 days to January. 90
8 days to January doesn't calculate to 90 days from the trial
9 date. True?

16:13:12 10 MR. CHRISTMAN: True.

11 THE COURT: All right. So if -- we've
12 discussed this to some extent. I want to know how
13 problematic it would be then if we pick some interim date
14 versus a January date, and we're going to consider all three
16:13:28 15 potential options. There are obviously multiple options,
16 but I am going to issue my decision on the trial date come
17 January -- I'm sorry, come Monday as whether it's January,
18 somewhere in between, October, November, or September, as
19 presently scheduled.

16:13:51 20 And I just want to hear one last time any
21 potential arguments or problems anyone can foresee besides
22 the obvious that's been argued relative to the September
23 dates as it pertains to the defendants. So now is your last
24 chance, because Monday I am going to issue the order. And I
16:14:13 25 will say this: If, if I give a continuance, I trust that I

1 will not have another request for a continuance?

2 MR. CHRISTMAN: Got my word, Your Honor.

3 MR. WHITAKER: Yes.

4 MS. BACON: Certainly we will not ask for a
16:14:38 5 continuance, Your Honor. Our position is we're ready to go
6 September 12. We've done everything we can to keep the
7 September 12 date, and we absolutely prefer a September 12
8 date. If the court believes that after weighing all the
9 options that's not possible, considering the length of the
16:14:56 10 trial and the difficult time we may have seating a jury
11 because of the length of the trial, the government is
12 concerned that if the trial goes over the holidays that,
13 one, it might be impossible to seat a jury to find someone
14 who doesn't already have plans during that time period, or
16:15:12 15 to be able to somehow not be inappropriately exposed during
16 a time when people are mingling with family and friends. We
17 think it would be in the best interest of everybody to start
18 it in early January, mid-January.

19 THE COURT: All right. I will issue the
16:15:26 20 decision on Monday, and I will issue with the decision a
21 schedule, a case management plan that will cover everything
22 from pretrial motions to motions in limine, which are
23 different, to all the way up through trial, jury
24 instructions.

16:15:52 25 And we will maintain the dates. I have a duty

1 to make an analysis not only as it pertains to the
2 defendants, but also the government and the public have
3 rights in this analysis. The public has a right to a speedy
4 trial.

16:16:16 5 And I understand that the case has been
6 designated as complex, and I understand all of the arguments
7 that have been made relative to the numbers of documents and
8 the breadth and depth involved in the discovery, but it
9 seems to me if counsel takes on a case after dates have been
16:16:33 10 set, it is incumbent upon them to make sure that they have
11 the ability to do what they have undertaken.

12 Now, I also understand the argument that
13 sometimes you can't know for certain how things are going to
14 unfold, and I also understand the arguments that until you
16:16:53 15 receive the superseding indictment, you just can't know for
16 certain, despite all the good will and good intentions there
17 might be in conveying the information in advance.

18 So I am well aware of all those arguments. I
19 am well aware of the interests of the public and the
16:17:19 20 interests of the defendant when it comes to speedy trial and
21 when it comes to proper preparation for trial.

22 And I will make my ruling in consideration of
23 all the factors that I am required to consider when
24 considering these motions for continuance.

16:17:44 25 Is there anything further?

1 I do think we have one issue that I want to
2 see if we can resolve, because I don't want any more delays
3 in this case. There's been a recent motion filed relative
4 to some discovery, and I want counsel in my chambers so that
16:18:01 5 we can see if we can resolve this quickly. We cannot
6 continue to have stops and starts in this case relative to
7 discovery.

8 That is not the way we're going to run the
9 case; okay? So I need to talk to counsel because I want
16:18:18 10 this issue resolved posthaste.

11 So with that, I appreciate your attendance. I
12 appreciate your providing me more detailed information
13 relative to the discovery, and the court will issue its
14 ruling relative to the date on Monday, and that will be the
16:18:43 15 end of the discussion relative to the trial dates.

16 That will concludes this hearing.
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Lori A. Callahan
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